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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 132

THE UNITED STATES, PETITIONER

vs.

RICHARD S. CORS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 29, 1948
CERTIORARI GRANTED OCTOBER 11, 1948

SUPREME COURT OF THE UNITED STATES

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No. 132

THE UNITED STATES, PETITIONER,

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RICHARD S. CORS

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1 In the United States Court of Claims

Docket No. 46796

RICHARD S. CORS, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

PETITION—Filed January 3, 1946

To the Honorable, the Court of Claims of the United States:

The Plaintiff, Richard S. Cors of New York, N. Y., respectfully represents that:

One: He is a citizen of the United States of America, residing in the County of Kings, State of New York.

Two: This suit is brought pursuant to Section 902, (d) of the Merchant Marine Act of 1936, as amended (53 Stat. 1256, 46 USC Sec. 1242 (d) to recover the balance of just compensation due plaintiff by defendant for the requisitioning of his steamtug.

2 Three: On and prior to October 15th, 1942, plaintiff was the owner of an iron steam screw vessel known as the MacArthur, whose official number was 241525. The vessel was built in 1895 in Baltimore, Maryland of charcoal iron. She had a speed of approximately 12 knots per hour, was 83.3 feet long, 17.6 feet beam, 9.6 feet depth and had a draft of approximately 7.6 feet. Her gross tonnage was 98.38 and her net tonnage 66. She had 250 horsepower. Aside from a large pilot house forward above the main deck she had a mess room, galley, toilet and shower, fiddley, upper engine room, stateroom with one berth, large room in main house from forward aft, large wardroom with two berths below decks aft of engine room and crews accommodations for eight below decks forward.

Four: On October 15th, 1942 the vessel was completely equipped to engage in the towage of other vessels. She was drydocked and her boiler extensively repaired, tested, inspected and passed by the United States Coast Guard Service and a certificate was issued by such Service under date April 18th, 1942. Her hull showed very minor wastage due to the fact that she was built of charcoal iron, had previously operated largely in fresh water, had had only limited usage and had been well kept up.

Five: The vessel was peculiarly well adapted to engage in towage of vessels and harbor craft in and about bays, sounds, rivers and harbors, for which she was licensed, not only in and about New York Harbor and tributary waters including Long Island Sound and the Hudson and East Rivers, but also the New York State Barge Canal and Great Lakes ports.

3 Six: The fair market value of the vessel on October 15th, 1942 was at least $20,000.

Seven: The War Shipping Administrator, acting on behalf of the War Shipping Administration, pursuant to the authority conferred by,

(1) Section 902 (a) of the Merchant Marine Act of 1936, as amended (53 Stat. 1255, USC Sec. 1242(a),

(2) The proclamation of the President of the United States made on May 27th, 1941, and

(3) Executive Order No. 9054 of February 7, 1942,

did on October 15, 1943, requisition title to plaintiff's vessel, the steam screw MacArthur, together with all furniture, fixtures, spare parts, appurtenances, and equipment thereunto appertaining and belonging. Delivery of the said vessel, together with her equipment was made to the War Shipping Administration at New York, N. Y. at 12:00 noon, October 15, 1942.

Eight: Thereupon, the defendant became obligated, under the aforesaid Section 902 (a) of the Merchant Marine Act of 1936, amended (53 Stat. 1255, 46 USC Sec. 1242(a), and the Fifth Amendment to the Constitution of the United States, to pay to plaintiff just compensation for the property so taken. Plaintiff submitted its claim and supporting data to the War Shipping Administration in an effort to have the Administrator fix the just compensation due plaintiff for said vessel, and her equipment, pursuant to the law in such case made and provided.

Nine: At the time that the said vessel was taken from plaintiff through the requisition order of the War Shipping Adminis-
4 tration, plaintiff became and was entitled to receive from the defendant, as just compensation for his property, the sum of at least $20,000, this amount being the reasonable and just market value of the property taken from the plaintiff by the defendant on the date of the taking, and being the amount of compensation necessary to be paid to plaintiff as a full and perfect equivalent in money of the property taken from him.

Ten: On May 18th, 1944, the War Shipping Administrator, acting on behalf of the War Shipping Administration, determined that plaintiff was entitled to the sum of only $9,000 as just compensation for the vessel, its furniture, fixtures, spare parts, appurtenances and equipment, taken from plaintiff by defendant under the requisition order aforesaid, and notified plaintiff that the total compensation to be offered by defendant to plaintiff for his property aforesaid was $9,000. Thereafter, on or about June 26th, 1944 plaintiff advised the defendant, represented by the Administrator, War Shipping Administration, that the amount of just compensation determined by the defendant was wholly unsatisfactory to the plaintiff.

Eleven: On or about July 17th, 1944, plaintiff and defendant, represented by the Administrator, War Shipping Administration, entered into an agreement whereby the defendant agreed to pay to plaintiff the sum of $6,750, being 75 per centum of the amount determined by the Administrator to be just compensation for the vessel, its equipment, and reserving to the plaintiff the right to sue the defendant in accordance with the provisions of Section 902 of the Merchant Marine Act of 1936, as amended, to recover such further sum as, added to the payment effected thereunder, would make up just compensation for the vessel. The said sum of $6,750 was paid to plaintiff on August 21st, 1944.

Twelve: The difference between $20,000, the amount the plaintiff was entitled to receive as just compensation for his property, and $6,750, the partial payment made by defendant to plaintiff as aforesaid, is $13,250. Plaintiff has suffered a loss in the latter amount by virtue of the requisition of his property in addition to interest, as part of just compensation, on $20,000 from October 15th, 1942 to August 21st, 1944, when the partial payment was made, and will continue to suffer loss by way of interest as part of just compensation on the balance of $13,250 due plaintiff as just compensation from August 21st, 1944 to the date of that just compensation shall be paid to plaintiff for its property.

Thirteen: No other action, suit or proceeding has been had with respect to the within claim in any Court, in the Congress or in any of the Departments other than as herein set forth. The plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government. Plaintiff is the sole and absolute owner of the claim herein presented, and has made no transfer or assignment of said claim or any part thereof or any interest therein. Plaintiff is justly

entitled to the full amount claimed herein from the defendant after allowing all just credits and offsets.

Wherefore, plaintiff prays judgment in his favor and against defendant, the United States of America, upon the facts
6 and law for the sum of $13,250, together with interest, as part of just compensation, at the rate of 6 per cent per annum on $20,000 from October 15th, 1942 to August 21st, 1944 and on $13,250 from August 21st, 1944 until just compensation is paid to plaintiff, pursuant to the law in such case made and provided, together with costs and disbursements of this action and for such other and further relief as may to this Honorable Court seem just and proper in the premises.

Respectfully submitted,

Sgd./ CHARLES B. MCINNIS,
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Washington, D. C.
Sgd./ FRANK C. MASON,
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Counsel for Plaintiff

Of Counsel:
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7-8 *Duly sworn to by Richard S. Cors. Jurat omitted in printing.*

9-10 GENERAL TRANVERSE—Filed February 12, 1946

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S.) JOHN F. SONNETT,
Assistant Attorney General.

J.B.M.
N.A.C.
E.E.E.

ARGUMENT AND SUBMISSION OF CASE—December 1, 1947

On December 1, 1947, the case was argued by Mr. Frank C. Mason for plaintiff, by Mr. Edgar T. Fell for defendant, and by Mr. William M. Aiken as Amicus Curiae.

11 SPECIAL FINDINGS OF FACT, CONCLUSION OF LAW, AND OPINION OF THE COURT BY WHITAKER, J.—Filed January 5, 1948.

Mr. Frank C. Mason for the plaintiff. *Messrs. Harold A. Kertz, Charles B. McInnis, Mahar & Mason* and *Roberts & McInnis* were on the brief.

Mr. Edgar T. Fell, with whom was *Mr. Assistant Attorney General Herbert A. Bergson*, for the defendant. *Mr. John B. Miller* was on the brief.

Mr. William M. Aiken as *Amicus Curie*. *Messrs. John G. Laylin, Edward G. Howard*, and *Covington, Burling, Rublee, Acheson & Shorb* were on the brief.

The facts necessary to a decision of the case are set out in the opinion; they are set out more in detail in the following

SPECIAL FINDINGS OF FACT

1. The plaintiff, a citizen of the United States, was on October 15, 1942, the sole owner of a steam vessel which he had theretofore named the *MacArthur*. On that date the War Shipping Administration, pursuant to Section 902 (a) of the Merchant Marine Act of 1936 as amended (53 Stat. 1254, 1255, requisitioned and took from plaintiff the ownership, possession and use of the vessel, including all of her equipment and spare parts.

2. The War Shipping Administration determined the amount of $9,000 to be just compensation for the vessel and on May 18, 1944, offered that sum to the plaintiff in full payment thereof. On June 26, 1944, plaintiff rejected the offer but on August 7, 1944,
12 he executed a bill of sale, a transferring title to the vessel to the United States, in consideration of the payment to him of $6,750, being 75 percent of the amount awarded by the defendant. In the bill of sale, plaintiff reserved the right to sue the United States to recover such further sum as, added to the $6,750, would constitute just compensation "in accordance with the provisions of Section 902 (a) of the Merchant Marine Act of 1936 as amended." On August 21, 1944, plaintiff received payment of $6,750.

3. The vessel, which was originally named the *Guthrie*, was built at Baltimore, Maryland, in 1895 according to the specifications and under the inspection of the U. S. Coast Guard. She is a steam-powered vessel with a charcoal iron hull.

At the time of the requisition, her gross and net tonnages were respectively 98.38 and 66. Her overall length was 90 feet and she was 83.3 feet long between perpendiculars. She had a beam of 17.6 feet, a depth of 9.6 feet and a draft of 7.6 feet. Her indicated horsepower was 200; her maximum speed was 9.5 knots; her cruising speed was 8.5 knots and her cruising radius 1,264 knots. Her bunker capacity was 27 tons of coal and her fuel consumption was from 5 to 6 tons per twenty-four hours.

She had an open deck with a bulwark surrounding it and had a main deckhouse above. At the forward end, there was a pilot house. In the main deckhouse there was a mess room, galley, toilet and shower, fiddley, upper engine room, stateroom with one berth and a large inspector's room. Below decks there was a large ward room with two berths and crew accommodations for eight.

She was fitted with a steam steering gear, domestic water tanks and reserved feed tanks for engine consumption, ballast and bunkers for coal.

She was equipped with a lifeboat, anchor, searchlight and life raft.

She was powered with a fore-and-aft compound engine, 12 inches by 24 inches by 20-inch stroke and was equipped with one Scotch boiler having two corrugated furnaces and a steam chimney. She had a steam-engine-driven generator, a condenser, pumps and a bronze propeller. She was also fitted with lines, hose, fire extinguishers, fire exhaust, tools and some spare parts.

13 Her consumable stores included 15 tons of coal, 15 gallons of engine oil and 10 gallons of cylinder oil.

4. From the time she was built until March 19, 1942, when she was sold to the plaintiff, the *Guthrie* remained in the ownership and possession of the U. S. Coast Guard. Until November 1939, the vessel was stationed in Baltimore harbor and was used by the Coast Guard as a boarding tender or tug to transport immigration, customs and health officers from the shore to vessels arriving in the harbor. She was never used for towing other vessels except in emergencies or for rescue work. During the greater part of her operations she was in fresh or brackish water rather than in salt water. Her work was much lighter than that engaged in by commercial towing vessels and consisted of irregular and infrequent trips from her berth in the harbor to and from incoming vessels.

A charcoal iron hull has a longer life than a steel hull and is much less affected by exposure to salt water and the elements. This, together with the manner in which the vessel was maintained and used, made for a longer life than if she had been constructed of steel and had been regularly engaged in commercial towing work in salt water.

5. In the latter part of 1939, the *Guthrie* was transferred from Baltimore Harbor to the Coast Guard base at Portland, Maine. On September 13, 1941, a special Board of Survey, appointed by the Coast Guard to ascertain the condition of the vessel and make recommendations regarding her disposition or repair, surveyed her and reported as follows:

HULL.—(a) That the plating (wrought iron) has considerable corrosion on interior surfaces but, generally speaking, is in good condition considering age of vessel.

(b) That there is about twenty hull frames and reverse frames in bad condition.

(c) That the water-tight bulkhead between the engine room and wardroom is corroded badly and leaks, allowing engine room bilge water to run back into the wardroom space.

(d) That the water-tight bulkhead between wardroom space and lazaret is completely corroded away at bottom where bulkhead joins hull frame.

(e) That the deck frames are in fair condition.

(f) That the tie plates are completely corroded away in places.

14 (g) That the main deck was found to be in fair condition and tight.

(h) That the deck house and superstructure is in fair condition.

(i) That the fresh water tanks in the lazaret leak and need repairing.

BOILER.—(a) That the boiler is excessively corroded on both water and fire surfaces.

(b) That there is a 5/16" hole corroded through the bottom of the starboard furnace just aft of the combustion chamber and that the metal is less than 1/15" thick at this point.

(c) That there is a 1/4" hole corroded through the back of the combustion chamber on the starboard side and about 5 inches up from the bottom, and the metal is very thin in this vicinity.

(d) That there is at least a 1/4-inch coating of scale and corrosion on top of the furnace crown sheets.

(e) That this boiler is unsafe to operate.

MAIN ENGINE.—In fair condition.

AUXILIARIES.—In fair condition.

Opinion.

That under normal conditions and considering the age of the vessel, the expense of putting this vessel in operating condition would not be justifiable and that the vessel should be placed out of commission; however, due to the present emergency and the great need of vessels, it is believed that necessary repair should be made to the hull, superstructure and fresh-water tanks, and the present boiler be removed and replaced by a suitable coal-fired watertube boiler or that the present steam plant be removed and replaced by a suitable Diesel plant with a small boiler to furnace steam heat. By doing the above work, it is believed that three or four years satisfactory service could be had from this vessel.

Recommendation

The board recommends that the necessary repairs be made to the hull, superstructure, and fresh-water tanks, and that the present boiler be removed and replaced by a suitable coal-fired water tube boiler or that the present steam plant be removed and replaced by a suitable Diesel plant with a small boiler for steam heat. The main engine and auxiliaries be examined and necessary repairs made to put them in good operating condition, this work to be done by the ship's force. That all interior metal surfaces be chipped, wire-brushed, and painted out by
15 the ship's force during this repair period.

6. After receiving the foregoing report, opinion and recommendation, Coast Guard Headquarters directed that the *Guthrie* be sold to the highest bidder in accordance with regulations.

Accordingly, the sale was advertised on the basis of sealed bids to be submitted by prospective buyers. The sale was conducted as an open-market transaction, but only three bids were received. On March 19, 1942, the vessel was sold to plaintiff, the highest bidder, for the sum of $2,875.

7. Promptly after purchasing the *Guthrie*, plaintiff applied to the Bureau of Marine Inspection and Navigation, Department of Commerce, for a certificate of inspection. The hull and boiler were inspected and plaintiff was required to perform certain repair work on the boiler in order to obtain the certificate. On April 20, 1942, plaintiff was issued a Certificate of Inspection, in which the vessel was designated as a "towing steam vessel" and was permitted "to navigate for one year, the waters of bays, sounds, rivers and harbors."

8. During the period between March 19, 1942, and April 26, 1942, plaintiff caused certain repairs and betterments to be made to the

vessel and purchased equipment necessary for her operation. Part of the work was performed by plaintiff and a crew of four men working under his supervision, and part was performed by a shipyard at Portland, Maine. Plaintiff was experienced in performing and supervising such repairs and improvements and tried to keep the costs as low as possible. He expended a total of $5,699.78 on labor and materials, but the amount would have been substantially greater had all of the work been performed by a shipyard at the abnormally high rates being charged at that time.

9. On April 21, 1942, a Consolidated Certificate of Enrollment and License was issued by the Department of Commerce, which granted plaintiff a license to employ the vessel in the coasting trade for a period of one year. After the repairs and improvements had been completed, plaintiff brought the vessel to New York City under her own power. After arriving in New York, he had her name changed from *Guthrie* to *MacArthur*. She was moored for a few days at a pier on the East River and from there was moved
16 under her own power to Chelsea, Staten Island, New York, where she remained until taken by the defendant. The *MacArthur* did not engage in any towing operations or other commercial work between the time she was acquired by plaintiff and the date of the requisition.

10. On September 25, 1942, the *MacArthur* was surveyed by Lieutenant Commander George Schneider, U. S. Navy, for the purpose of determining her suitability for use on the Eastern Sea Frontier of the U. S. Navy as a steam heating plant for heating and pumping fuel oil from oil barges into combat vessels of the Navy. The written report of the survey with respect to the condition of the vessel read as follows:

> The "*MacArthur*" formerly the U. S. R. S. "*Guthrie*," operated by the U. S. C. G. is a coal burning steam tug and tender with iron hull, four steel water-tight bulkheads, wood deckhouse, plumb bow and over hanging rounded stern. The outer hull plating is pitted at the water line and there is evidence of moderate scale, the stem is slightly bent and the bow hull plating, Stbd. & Port side above the water line is slightly dented. The inner skin, bulkheads and frames are slightly pitted and there is moderate scale. Bulkhead #2 is badly corroded at the base and the metal is sloughed away at the edges of several frames in the coal bunkers. There is a layer of cement of about $\frac{3}{4}$" to 1" in thickness in the turn of the bilge, and the after-bilge has approximately 8 Ton of Pig-Iron Ballast. The steel plating under the wood main deck is badly corroded. The wood deckhouse, main deck, bulwark and guard rail are in fair to good condition; no structural weakness was noted. The

vessel was in the water at the time of inspection, the underwater portion of the hull could not be examined. The main engine, boiler and auxiliary machinery were not opened at the time of inspection, but are reported to be in satisfactory operating condition. During March and April 1942, and prior to issuing a certificate, this vessel was inspected by the Local Inspectors Bureau of Marine and Inspection Service at Portland, Maine. At that time the boiler was drill tested and the recorded thickness is .538, a section of wrapper sheet and 27 Stay bolts, including several rivets were renewed. Considering the age of the vessel the material condition as a whole is fair to good.

17 Commander Schneider estimated that the original cost of the *MacArthur* was $45,000; that her replacement cost was $56,000 and he appraised her at $9,000.

His appraisal was based on his opinion that the tug, without excessive expenses for repairs, had six years of useful life. He decided that the value of the vessel should be depreciated during the remaining useful life at 3.3 percent per year and he calculated that she was worth 19.8 percent of her estimated cost, or about $9,000. The appraisal did not take into account the market value of the vessel.

11. After the War Shipping Administration requisitioned the *MacArthur* on October 15, 1942, she was used by the Navy at the docks of the Eastern Sea Frontier for furnishing steam to heat oil for use in combat vessels. There is no proof that she was used by the Navy for any other purpose.

12. By an Executive Order issued October 15, 1943, the President of the United States established an Advisory Board on Just Compensation, consisting of Judge Learned Hand, Judge John J. Parker, and Judge Joseph C. Hutcheson, Jr., to establish fair and equitable standards, rules and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned by the Administration. On December 7, 1943, the Board submitted to the Director of the War Shipping Administration its report, which, insofar as pertinent contained the following rules:

Rule 1.—Just compensation for vessels requisitioned for title or for use is to be determined on the basis of value as of the date of taking, subject to deduction on account of enhancement, if any, as hereinafter set out in rule 4, and with allowance for any loss on account of delay in payment from the date of taking, not exceeding the current commercial rate of interest.

Value means value on the American market, not on foreign markets.

* * * * * * * *

Rule 3.—Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is to be determined by the Administrator from a consideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based.
18 These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

Rule 4.—From the value at the time of taking, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect occurred before or after the declaration of the national emergency of May 27, 1941. Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted. In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted.

13. In determining the amount of just compensation to be paid for the *MacArthur*, the War Shipping Administration had before it and was guided by the survey made by the Coast Guard on September 13, 1941 (finding 5), the survey and appraisal made by Commander Schneider on September 25, 1942 (finding 10), and the rules established by the Advisory Board on Just Compensation.

14. At the time of the requisition, there existed in and about the Port of New York a rising market and a strong demand for tugs of all types, including the *MacArthur*. This situation was due to the

greatly increased traffic in the harbor during the period of the war, to the fact that the Government had been requisitioning tugs and to the resulting shortage of tugs. Tugs were operated day and night in an effort to handle the increased business and, under those conditions most tug owners were reluctant to sell. However, from August 1941 to February 1943, six tugboats were sold on the open market in or near the Port of New York. None of these sales involved a vessel closely comparable to the *MacArthur* in design, power, and equipment.

15. The *MacArthur* was not designed or powered for engaging in general towing operations as in the case of most tug boats built specifically for such work. Her beam was too narrow in proportion to her length and her deckhouse was too long. Her power plant was old and the cost of providing fuel was high in relation to the amount of horsepower obtained. She was too small for docking or otherwise handling oceangoing ships in the harbor or for engaging in coastwise towing.

She could have been adapted for use in the Erie Canal, but in order to compete successfully with other tugs engaged in that work, it would have been necessary to convert her from steam to Diesel power. The proof does not show the cost of making this change in power at the time of the taking.

However, the *MacArthur* could have been used as a towing vessel for shifting barges, lighters, and other craft in the congested slips in the harbor and for towing barges or pushing oil barges about New York Harbor, in Long Island Sound, and in the New York State Barge Canal. Her beam in relation to her length did not detract from her capacity for performing such work and her comparatively shallow draft was advantageous for harbor and shoal water towing.

Although she was fitted with side bitts for towing alongside, she lacked a stem head and stern towing bitts, which are necessary to enable any tug to tow other craft astern. At the time of the requisition, it would have cost $3,500 to install the necessary towing bitts on the *MacArthur*.

16. The fair market value of the *MacArthur* at the time and place of the taking was the sum of $15,500.00.

17. Beginning on September 8, 1939, the date on which the President proclaimed the existence of a limited national emergency, and continuing up to the date that plaintiff's vessel was requisitioned, there was a general rise in the market values of nearly all vessels in and about the Port of New York. This increase in values between September 8, 1939 and May 27, 1941, the date on which the President proclaimed the existence of a general national emergency, was due to the demand for vessels which followed the outbreak of war in Europe. After May 27, 1941 and particularly after December 7,

1941, the date of the Japanese attack on Pearl Harbor, the
20 rise in market values was due to the Government's need for vessels, which necessitated the taking of many vessels, and to the great increase in shipping and in harbor traffic which occurred during the period of the war. These conditions combined to create a demand for and a shortage of tugs. As a result, the market value of the *MacArthur* had been enhanced by the sum of $5,000.00 by October 15, 1942.

Prior to the time the defendant requisitioned the *MacArthur* there was no reasonable prospect that she would be requisitioned, and no part of the enhancement in her value was due to such a prospect.

18. Just compensation for the taking of the *MacArthur* is $15,500 plus compensation for delay in payment computed at four percent per annum on this amount from October 15, 1942 until August 21, 1944, and on $8,750.00 from August 21, 1944 to date of payment. Against the aggregate the defendant is entitled to a credit of the amount already paid by it of $6,750.00.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover the sum of $15,500, plus compensation for delay in payment, computed at four percent per annum on this amount from October 15, 1942, until August 21, 1944, and on $8,750.00 from August 21, 1944, to date of payment. Against the aggregate the defendant is entitled to a credit of the amount already paid by it of $6,750.00.

It is therefore ordered and adjudged that plaintiff recover of and from the United States the sum of fifteen thousand five hundred dollars ($15,500), plus compensation for delay in payment, computed at four (4) percent per annum on this amount from October 15, 1942, until August 21, 1944, and on eight thousand seven hundred fifty dollars ($8,750) from August 21, 1944 to date of payment. Against the aggregate the defendant is entitled to a credit of the amount already paid by it of six thousand seven hundred fifty dollars ($6,750.00).

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Opinion

Whitaker, *Judge*, delivered the opinion of the court:

On October 15, 1942, defendant requisitioned plaintiff's steamship *MacArthur*. The War Shipping Administration determined that $9,000 was just compensation. Upon plaintiff's rejection of this award there was paid to him the sum of $6,750, being 75 percent of the amount of the award as required by the Merchant Marine Act of 1936 (53 Stat. 1254, 1255). He sues for what he says is just compensation.

The vessel was built in 1895 for the Coast Guard, and was operated by it until about March 19, 1942, when it was sold to the highest bidder for $2,875.00. Plaintiff, the purchaser, spent $5,699.78 on repairing it, doing much of the work himself at a considerable saving in cost.

After the vessel had been reconditioned, and a license for its operation had been secured on April 21, 1942, it was removed to New York City, where it was moored until it was requisitioned by the defendant on October 15, 1942.

The commissioner has found that $15,500 was its fair market value at the time of the taking. Plaintiff does not acquiesce in this, but we do not think a higher value can be justified. This, we think, represents its fair market value. It is almost twice as much as plaintiff's investment in the vessel.

Defendant admits that the boat could have been sold on the market for this amount, but it admits liability for only $10,500, because it says that $5,000 of the market value of the vessel was due to an enhancement in market value brought about by the Government's need for vessels which necessitated their taking. The defendant claims that the amount of such enhancement in value should be deducted from the fair market value of the vessel in determining just compensation. This is the principal issue in the case. In determining it, we have been much assisted not only by the briefs of the parties but also by a brief filed by Covington, Burling, Rublee, Acheson & Shorb as *amicus curiae*.

We have found that the increase in the market value of this vessel was due, first, to the great increase in shipping and harbor traffic due to the war and, second, to the Government's need for vessels in the prosecution of the war, which necessitated the requisi-
22 tioning of many of them.

It is not possible to allocate to the second cause a definite part of the increase in market value, but even if it were possible to do so, we do not think the defendant is entitled to a deduction from market value on this account. We do not think the Government should pay a property owner less than he could have secured for his property from someone else. If an owner has a vessel and there are people who are willing to pay him $15,500 for it, and he wants to sell it at this price, but the Government intervenes and takes his vessel, it is not just, ordinarily at least, that the Government should pay him for it any lesser amount. Except in rare circumstances, he has not been justly compensated for his property unless he secures from the condemner what he could have secured from others.

Fair market price, where there is a free market, has ever been the usual standard of just compensation. *Boom Co.* v. *Patterson*, 98 U. S. 403, 407; *Monongahela Navigation Co.* v. *United States*,

148 U. S. 312, 327; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 80, 81; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299; *Vogelstein* v. *United States*, 262 U. S. 337; *United States* v. *New River Collieries*, 262 U. S. 341; *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *Miller*, 317 U. S. 369, 374.

Defendant says, however, that this rule does not apply where the Government is forced by the necessities of war to condemn property. In support of this statement it relies particularly on *United States* v. *Miller*, *supra*, and on Rule 4 laid down by the President's Advisory Board on Just Compensation, consisting of Judges Learned Hand, John J. Parker and Joseph C. Hutcheson, and also on section 902 (a) of the Merchant Marine Act of 1936, as amended (53 Stat. 1254, 1255).

We do not think the case of *United States* v. *Miller*, *supra*, supports defendant's position. That case reiterates the holding of the Supreme Court in *Kerr* v. *South Park Commissioners*, 117 U. S. 379, and *Shoemaker* v. *United States*, 147 U. S. 282, to wit, that a condemner is not liable for any increase in value due to its initiation of a project necessitating the taking of the property condemned. This rule is designed to prevent the owner from profiting from an
23 increase in market value due to speculation as to the amount the condemner might be compelled to pay for the property. The Supreme Court in *United States* v. *Miller*, page 377, thus stated the reason for the rule.

> * * * If their lands were probably to be taken for public use, in order to complete the project in its entirety, any increase in value due to that fact could only arise from speculation by them, or by possible purchasers from them, as to what the Government would be compelled to pay as compensation.

This rule, however, is limited to property lying within the scope of the project. If a parcel of land, not within the limits of the original project, gained in value by reason of its proximity to the public improvement, and if later it was decided to enlarge the project and to condemn this additional land, the increase in value due to its proximity to the project is not to be excluded in determining just compensation. This is because its increase in market value was not due to speculation as to what the owner might be able to compel the Government to pay for it, but to a natural increase in the value of the property on account of its environment, apart from any prospect of its condemnation by the Government.

In short, before any part of the market value of a piece of property is to be eliminated, it must appear that it was brought about by the prospect of its condemnation by the Government. So, for the case at bar to come within the rule of the *Miller* case, it would have to appear that it was known that the defendant had entered

upon a project that would probably result in the condemnation of plaintiff's vessel, and that this fact had caused the increase in market value. The outbreak of war alone and the resulting need of the Government for vessels generally do not bring the case within the rule. In addition it would have to appear, at the least, that it was the known program of the Government to condemn all vessels similar to plaintiff's vessel.

The proof falls far short of this. Many vessels similar to plaintiff's were left in private hands, and it was known they would be. Indeed, the Government itself had disposed of this very vessel seven months before. This was ten months after the outbreak of hostilities. There seemed to be no prospect of its being requisitioned. It is only the enhancement in value due to speculation on
24 account of the imminent prospect of requisition that is to be eliminated.

So much for the *Miller* case. The rules formulated for the guidance of the War Shipping Administration by the eminent jurists composing the President's Advisory Board on Just Compensation are entitled to great respect; but it must be remembered that these rules were promulgated for the guidance of an administrative body administering the Merchant Marine Act of 1936. That Act provided that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use." In formulating rules for the guidance of an administrative body administering this Act this Committee, of course, could not run counter to this provision of the Act, and so in Rule 4 it was provided, in part, that "from the value at the time of taking there should be deducted any enhancement due to the Government's need of vessels which has necessitated the taking. * * *."

It is a recognized principle of the law of eminent domain that in determining market value there should be eliminated any special value incident to an owner's unwillingness to sell his land because of its special adaptability to his own use, and a taker's special need for the land because of its particular fitness for the taker's purposes. *United States* v. *Miller*, *supra*, p. 375. If the rule laid down by the Advisory Board be so limited, it is a correct statement of the law; but if it be interpreted to mean that the Government is not required to pay as much for property condemned as others were willing to pay for it for their own use, then it is not a correct statement of the law. If the owner could have sold the vessel to private parties for their own use for $15,500, certainly he is entitled to no less from the Government when it prevents him from making the sale by taking his property away from him.

We take it that the rule means no more than that any increment in value due to an owner's unwillingness to sell and the Govern-

ment's special need were to be eliminated. If it means more than this, it cannot be followed by the courts in fixing just compensation.

25 The elimination of enhancement in value due to previous takings of similar vessels or to the probable prospective taking of the particular vessel must be interpreted in the light of the rule reiterated in *United States* v. *Miller*, *supra*, which we have heretofore discussed. This means that if the taking of this vessel was within the reasonably probable scope of a program for the condemnation of vessels, known to have been initiated by the defendant, any increase in value incident to speculation as to what the Government might be required to pay is to be eliminated. That it was within the scope of the program might be evidenced by the taking of similar vessels or anything else that might show that the taking of this vessel was reasonably probable. An increase in value due to this prospect of condemnation is to be eliminated. But the proof shows that the condemnation of this vessel was not within any program adopted by the Government. There was no reasonable prospect of its condemnation. All indications were that the Government did not want this vessel.

We understood defendant to say in argument that the Merchant Marine Act of 1936, limiting the amount to be paid when vessels were requisitioned, was only a direction to the administrative agency, and that it was not intended to be binding on the courts when they are called upon to fix just compensation. It has been held that the determination of just compensation is a "judicial function, and [that] no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard." *United States* v. *New River Collieries*, 262 U. S. 341, 343-344, citing *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327. We assume the Act was passed with this longstanding limitation in mind and that it was not intended to lay down a rule binding on us.

We are of opinion that neither *United States* v. *Miller*, *supra*, the rules of the President's Advisory Board on Just Compensation, nor the Merchant Marine Act of 1936 require us to abandon or to modify in this case the standard of market value laid down by the Supreme Court in the cases cited *supra*. Since plaintiff could have gotten for his vessel $15,500 from private persons for their own use, he is entitled to no less from the Government.

26 Plaintiff is entitled to recover $15,500, plus compensation for delay in payment, computed at four percent per annum on this amount from October 15, 1942 until August 21, 1944, and on $8,750.00 from August 21, 1944 to date of payment. Against the aggregate the defendant is entitled to a credit of the amount

already paid by it of $6,750. Judgment for this amount will be entered. It is so ordered.

HOWELL, *Judge*; MADDEN, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Justice*, concur.

27-28 JUDGMENT OF THE COURT—January 5, 1948

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of fifteen thousand five hundred dollars ($15,500), plus compensation for delay in payment, computed at four (4) percent per annum on this amount from October 15, 1942, until August 21, 1944, and on eight thousand seven hundred fifty dollars ($8,750) from August 21, 1944, to date of payment. Against the aggregate the defendant is entitled to a credit of the amount already paid by it of six thousand seven hundred fifty dollars ($6,750.00).

29-30 PROCEEDINGS AFTER ENTRY OF JUDGMENT

On March 2, 1948, the defendant filed a motion for a new trial.

On April 5, 1948, the court entered the following order on said motion:

ORDER

It is ordered this 5th day of April, 1948, that the defendant's motion for new trial be and the same is hereby overruled.

31 Clerk's Certificate to foregoing transcript omitted in printing.

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Supreme Court of the United States

Order allowing certiorari

Filed October 11, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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